Supreme Court, U.S.
FILED

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No. ____

In The

Supreme Court of the United States

October Term, 1996

WILLIAM MAURICE RUSH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals For The First Judicial District Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Double Jeopardy Clause of the Fifth Amendment bar the criminal prosecution of a motorist for driving while intoxicated after the administrative suspension of his driver's license for refusing a breath test?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the 1st Court of Appeals of Texas, which held that the prosecution of a motorist for DWI, following the administrative suspension of his driver's license for refusing a breath test, does not violate double jeopardy.

OPINION BELOW

The unpublished opinion of the court of appeals was issued on April 25, 1996 (Appendix A). The Court of Criminal Appeals denied discretionary review on February 19, 1997 (Appendix B).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

This case involves § 49.04 of the Texas Penal Code (Appendix C) and Texas Revised Civil Statute article 6701l-5, § 2 (the implied consent statute) (Appendix D).[1]

STATEMENT OF THE CASE

On July 16, 1995, a police officer arrested petitioner for DWI. After petitioner refused a breath test, he was formally charged with DWI.

On August 24, 1995, the Texas Department of Public Safety (DPS) suspended petitioner's driver's license for 90 days because he had refused the breath test following his arrest for DWI. Petitioner surrendered his license to the DPS and was required to pay a $100.00 reinstatement fee to get it back.

On December 8, 1995, petitioner filed a pretrial application for writ of habeas corpus seeking to bar prosecution for DWI on double jeopardy grounds. On December 20, 1995, the trial court held an evidentiary hearing and denied relief. Petitioner filed a pretrial appeal.

On April 25, 1996, the court of appeals affirmed the denial of relief in an unpublished opinion. On February

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[1] The implied consent statute was recodified, effective September 1, 1995, as §§ 524.011-15 of the Texas Transportation Code.

19, 1997, the Court of Criminal Appeals denied discretionary review. *Ex parte Rush*, no. 01-96-123-CR (Tex. App. – Houston [1st Dist] 1996, pet. ref'd).

REASONS FOR GRANTING THE WRIT

THE ADMINISTRATIVE SUSPENSION OF A MOTORIST'S DRIVER'S LICENSE FOR REFUSING A BREATH TEST CONSTITUTES PUNISHMENT THAT BARS A SUBSEQUENT PROSECUTION FOR DRIVING WHILE INTOXICATED ON DOUBLE JEOPARDY GROUNDS

The Texas Court of Criminal Appeals has held that the suspension of a driver's license and a $100.00 reinstatement fee does not constitute punishment so as to create a double jeopardy bar to prosecution of the motorist for DWI. *Ex parte Tharp*, 935 S.W.2d 157 (Tex. Crim. App. 1996). The opinion was predicated on the conclusion that an administrative license suspension constitutes a remedial civil sanction intended to protect the public rather than a criminal sanction to punish the motorist.[2]

Whether "criminal" or "civil," a sanction constitutes punishment if it serves the goals of punishment – retribution and deterrence. *United States v. Halper*, 490 U.S. 435,

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[2] In *United States v. Ursery*, 518 U.S. ___, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), this Court held that an in rem civil forfeiture is essentially a remedial civil action that does not constitute punishment, and in any event, is not so punitive as to render it criminal for double jeopardy purposes. The concurring opinion in *Tharp* observed that the suspension of a driver's license does not constitute an in rem forfeiture, as in *Ursery*. *Ex parte Tharp*, 935 S.W.2d at 162, n.1 (Meyers, J., concurring). Accordingly, *Ursery* is not dispositive of the issue.

448 (1989). That a sanction is labeled "civil" is not dispositive for double jeopardy purposes. "Simply put, a civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.* see also *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) (sanction constitutes punishment even though designated as "tax"). In order to determine whether a sanction constitutes punishment, a "particularized assessment" must be made of "the sanction imposed and the purposes that the sanction may fairly be said to serve." *United States v. Halper*, 490 U.S. at 448. The court must look to the entire scope of the statute, its stated purpose and legislative history, and how the machinery of government actually works in the individual case. *Id.* at 447.

In *Department of Revenue of Montana v. Kurth Ranch, supra*, this Court considered a "drug tax" that Montana imposed upon persons arrested for drug offenses. The Court held that the tax was "fairly characterized as punishment" because it was (a) more than eight times the market value of the drugs, (b) conditioned upon the commission of a crime, (c) invoked only after the taxpayer was arrested for the same conduct giving rise to the tax, and (d) levied only upon criminals.

Applying the *Kurth Ranch* analysis to petitioner's case, an administrative license suspension also is "fairly characterized as punishment." The suspension is conditioned upon the commission of a crime, as it is imposed only after the motorist has been arrested for DWI. Motorists arrested for DWI comprise the entire class of persons subject to this license suspension.

In *Austin v. United States*, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), this Court found it significant that the forfeiture statute at issue contained several "innocent owner" defenses, observing, "These exemptions serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less." 125 L.Ed.2d at 504. Likewise, the structure of the Texas statute demonstrates the legislature's intent to focus on the culpability of the suspected intoxicated motorist in a similar manner. For example, the suspension period is more severe for refusing the breath test (90 days) than for failing it (60 days).

Although the Texas statute is partly remedial, its major objective is to punish and deter drunk drivers. The State cannot prevail on the double jeopardy issue simply by showing that a license suspension has some remedial effects, any more than the government could prevail in *Halper, Austin* or *Kurth Ranch* by showing that some of the fines, forfeited assets or taxes would be used to reimburse government agencies for their law enforcement costs. "A civil sanction that cannot be fairly said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *United States v. Halper*, 490 U.S. at 448. Thus, an administrative license suspension constitutes punishment, and should bar the subsequent prosecution of the motorist for DWI on double jeopardy grounds.

CONCLUSION

Petitioner requests that this court grant the petition for writ of certiorari.

Respectfully submitted,

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Judgment affirmed and Opinion filed April 25, 1996

[SEAL]

In The

COURT OF APPEALS

For The

FIRST DISTRICT OF TEXAS

NO. 01-96-00123-CR

WILLIAM MAURICE RUSH, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from County Criminal Court at Law No. 14
Harris County, Texas
Trial Court Cause No. 95-53437

OPINION

Appellant, William Maurice Rush, appeals from the trial court's denial of habeas corpus relief in his pretrial writ of habeas corpus that asserts a double jeopardy bar to his prosecution for driving while intoxicated (DWI). We affirm.

After appellant was arrested for DWI, he refused to submit to a breath test to determine his blood alcohol content. Due to his refusal, appellant was served with

notice that his driver's license would be suspended pursuant to former TEX. REV. CIV. STAT. ANN. art. 6701*l*-5.[1] Following a hearing to contest the suspension of appellant's driver's license, a state administrative law judge suspended appellant's license for 90 days. Appellant filed a pretrial application for writ of habeas corpus asserting that his prosecution for DWI was prohibited. The trial court denied habeas relief.

In his sole point of error, appellant contends the DWI prosecution is barred by the double jeopardy clauses of the fifth amendment of the United States Constitution,[2] article I, section 14 of the Texas Constitution,[3] and TEX. CODE CRIM. P. ANN. art. 1.10 (Vernon 1994) because it would result in multiple punishments for the same offense.

This Court recently held the suspension of a driver's license for a refusal to take a breath test, following an administrative suspension hearing, does not result in a bar to prosecution for DWI. *Johnson v. State*, No. 01-95-00440-CR (Tex. App. – Houston [1st Dist.], Jan. 11, 1996, pet. filed). Based upon the reasoning in *Johnson*, we hold that the double jeopardy bar does not apply here.

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[1] *See* Act of May 29, 1993, 73d Leg., R.S., ch. 886, § 9, 1993 Tex. Gen. Laws 3515, 3525, *repealed by* Act of May 1, 1995, 74th Leg., R.S., ch. 165, § 24, 1995 Tex. Gen. Laws 1025, 1871 (current version at TEX. TRANSP. CODE § 724.035 (Vernon 1996)).

[2] U.S. CONST. amend. V.

[3] TEX. CONST. art. I, § 14.

Accordingly, we overrule appellant's sole point of error and uphold the trial court's denial of habeas corpus relief.

/s/ Tim Taft
Tim Taft
Justice

Chief Justice Schneider and Justice Andell also participating.

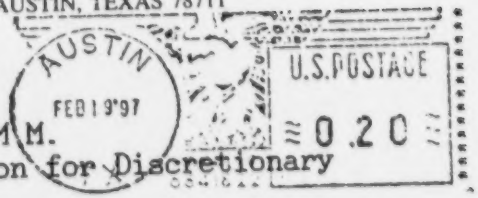
Do not publish. TEX. R. APP. P. 90.

Judgment rendered and opinion delivered APR 25 1996
True Copy Attest:

/s/ Margie Thompson
Margie Thompson
Clerk of Court

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

February 19, 1997
COA#: 10-96-00123-CR
RE: Case No. 0832-96
STYLE: RUSH, EX PARTE WILLIAM M.



On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

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HOUSTON TX 77010

03

§ 49.04. Driving While Intoxicated

(a) A person commits an offense if the person is intoxicated while driving or operating a motor vehicle in a public place.

(b) Except as provided by Subsection (c) and Section 49.09, an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.

(c) If it is shown on the trial of an offense under this section that at the time of the offense the person driving or operating the motor vehicle had an open container of alcohol in the person's immediate possession, the offense is a Class B misdemeanor, with a minimum term of confinement of six days.

Added by Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994.

Art. 6701*l*-5. Specimens of breath or blood; implied consent; evidence

Refusal to Give Specimen; Suspension of License, Permit or Privilege

Sec. 2. (a) Except as provided by Subsection (i) of Section 3 of this Act, if a person under arrest refuses, upon the request of a peace officer, to give a specimen designated by the peace officer as provided in Section 1, none shall be taken.

(b) Before requesting a person to give a specimen, the officer shall inform the person orally and in writing that if the person refuses to give the specimen, that refusal may be admissible in a subsequent prosecution, and that the person's license, permit, or privilege to operate a motor vehicle will be automatically suspended for 90 days after the date of adjournment of the hearing provided for in Subsection (f) of this section, whether or not the person is subsequently prosecuted as a result of the arrest. If the officer determines that the person is a resident without a license or permit to operate a motor vehicle in this state, the officer shall inform the person that the Texas Department of Public Safety shall deny to the person the issuance of a license or permit for a period of 90 days after the date of adjournment of the hearing provided for in Subsection (f) of this section, whether or not the person is subsequently prosecuted as a result of the arrest. The officer shall inform the person that the person has a right to a hearing on suspension or denial if, not later than the 20th day after the date on which the notice of suspension or denial is received, the department receives a written demand that the hearing be held.

(c) The officer shall provide the person with a written statement containing the information required by Subsection (b) of this section. If the person refuses the request of the officer to give a specimen, the officer shall request the person to sign a statement that the officer requested that he give a specimen, that he was informed of the consequences of not giving a specimen, and that he refused to give a specimen.

(d) If the person refuses to give a specimen, whether the refusal was express or the result of an intentional failure of the person to give a specimen as designated by the peace officer, the officer before whom the refusal was made shall immediately make a written report of the refusal to the Director of the Texas Department of Public Safety.

(e) The director shall approve the form of the report. The report must show the grounds for the officer's belief that the person had been operating a motor vehicle while intoxicated. The report must also show that the person refused to give a specimen, as evidenced by:

(1) a written refusal to give a specimen, signed by the person; or

(2) a statement signed by the officer stating that the person refused to give a specimen and also refused to sign the statement requested by the officer under Subsection (c) of this article.

(f) When the director receives the report, the director shall suspend the person's license, permit, or nonresident operating privilege, or shall issue an order prohibiting the person from obtaining a license or permit,

for 90 days effective 28 days after the date the person receives notice by certified mail or 31 days after the date the director sends notice by certified mail, if the person has not accepted delivery of the notice. If, not later than the 20th day after the date on which the person receives notice by certified mail or the 23rd day after the date the director sent notice by certified mail, if the person has not accepted delivery of the notice, the department receives a written demand that a hearing be held, the department shall, not later than the 10th day after the day of receipt of the demand, request a court to set the hearing for the earliest possible date. The hearing shall be set in the same manner as a hearing under Section 22(a), Chapter 173, Acts of the 47th Legislature, Regular Session, 1941, as amended (Article 6687b, Vernon's Texas Civil Statutes). If, upon such hearing the court finds (1) that probable cause existed that such person was driving or in actual physical control of a motor vehicle on the highway or upon a public beach while intoxicated, (2) that the person was placed under arrest by the officer and was offered an opportunity to give a specimen under the provisions of this Act, and (3) that such person refused to give a specimen upon request of the officer, then the Director of the Texas Department of Public Safety shall suspend the person's license or permit to drive, or any nonresident operating privilege for a period of 90 days, as ordered by the court. If the person is a resident without a license or permit to operate a motor vehicle in this State, the Texas Department of Public Safety shall deny to the person the issuance of a license or permit for 90 days.

(g) If, after the hearing, the court finds in the negative one of the issues required by Subsection (f) of this

section, the director shall reinstate any license, permit, or privilege to operate a motor vehicle and shall rescind any order prohibiting the issuance of a license or permit on the basis of the person's refusal to give a specimen under Subsection (d) of this section.

(h) A written report submitted by an officer under Subsection (d) of this article is a governmental record for the purposes of Section 37.10, Penal Code.

(i) A person whose license, permit, or privilege is suspended under this section, or who is the subject of a prohibition order issued under this section, is subject to Section 34, Chapter 173, Acts of the 47th Legislature, Regular Session, 1941 (Article 6687b, Vernon's Texas Civil Statutes).

Sec. 2 amended by Acts 1983, 68th Leg., p. 1577, ch. 303, § 4, eff. Jan. 1, 1984; Sec. 2(i) added by Acts 1987, 70th Leg., ch. 922, § 3, eff. Sept. 1, 1987.